United States Court of Appeals

for the Second Circuit

APPENDIX

75-1318

B
P/S

To be argued by
HERMAN KAUFMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

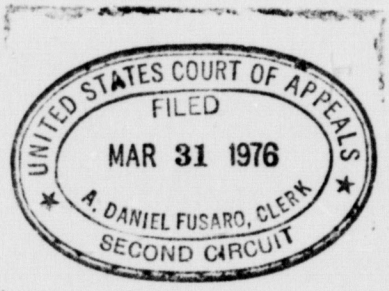
- against -

RICARDO INNISS and
GERTRUDE McLENAN,

Defendants-Appellants.

APPENDIX TO BRIEF FOR APPELLANT GERTRUDE McLENAN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



HERMAN KAUFMAN
Attorney for Appellant
Gertrude McLenan
120 Broadway
New York, New York 10005
(212) 349-6750

LITMAN, FRIEDMAN & KAUFMAN
LEWIS R. FRIEDMAN
of counsel

4

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

D. C. Form No. 100

CRIMINAL DOCKET

74CR 791

JUDD, J.

TITLE OF CASE	ATTORNEYS AUSA
THE UNITED STATES	For U.S.: 743,659 R.DePetris
vs.	for deft. INNIS:
RICARDO INNISS, a/k/a "Ricky"	Marvin Preminger
GERTRUDE MC LENAN, a/k/a "Peaches" and	66 Court St. Bklyn, NY.
ROBERTO ALVAREZ	834-8888
	For Defendant: MC LENAN
	Herbert Handman - 36 W. 44
	N.W, N.Y. 986-5460

Did import cocaine into the United States

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		8-8-75	Notice of Appeal (Gertrude McLean)	5 -	
Clerk,		8-11-75	Paid to Treasurer		5 -
Marshal,		8-11-75	Notice of appeal (Innis)	5 -	
Attorney,		3-19-75	Paid To Treas		5 -
Commissioner's Court,					
Witnesses,					

UNITED STATES COURT OF APPEALS
FILED
MAR 17 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

DATE	PROCEEDINGS
12-17-74	Before JUDD, J - Indictment filed ordered sealed by the Court. Bench Warrants Ordered and Issued for all defts.
1/31/75	Before JUDD,J.- Case called- Deft and counsel Ira London present- ~~Deft~~ ~~XXXXXX~~ Indictment ordered unsealed- Deft INNISS arraigned and enters a plea of not guilty- Govt's application for $50,000.00 bail argued- bail set at $20,000.00 surety bond plus $10,000.00 P.R.Bond- case adjd to 2/24/75 for trial
2/3/75	Benchwwarrant retd and filed- executed(INNISS)
2/4/75	Before JUDD,J.- Case called- Deft and counsel present- Deft McLenan arraigned and enters a plea of not guilty- deft to surrender by 2/11/75 Bail set in Boston at $30,000.00 Surety Bond secured by 10% cash- Bail conditions contd- Case adjd to 2/18/75 at 2:00 P.M. for conference and to 2/24/75 at 10:00 A,M. for trial

DATE	PROCEEDINGS
2/4/75	Notice of appearance filed(McLENAN)
2-5-75	Before JUDD, J - case called - deft not present - counsel Ira London present - defts motion for reduction of bail - motion argued - motion denied. (RICARDO INNISS)
2/14/75	Affidavit of A.U.S.A. Fried filed
2-18-75	Magistrates proceedings filed redeft Gertrude McLenen received from Clerk , U.S. District Court, Boston, Mass. Acknowledgment mailed to Clerk for receipt of papers as listed on letter from Clerk, Boston, Mass. dated 2-12-75. (Bank Book 5 401769-4 re deft and U.S.Merchant Mariners Document of deft placed in vault)
2/18/75	Before JUDD,J.- Case called- Defts and counsel present-Govt's motion to disqualify Mr. London as counsel for deft Inniss- motion argued- decision reserved pending submission of further papers by 2/24/75- pre-trial conf. held and concluded- case adjd to 3/17/75 at 10:00 A.M. for trial
2/24/75	Magistrate's files 75 M 227 and 75 M 228 inserted into CR file.
3/3/75	Letter dated 3/3/75 filed from E. Korman to J. Judd
3/5/75	Affidavit of A.U.S.A. D. DePetris filed
3-14-75	Before Judd, J - case called - defts & counsels present -conference held and concluded - deft McLean motion to sever argued - motion denied case referred to Magistrate for any open discovery matters - adjd to 4-7-75 for trial.
3 20 75	Before SCHIFFMAN, Magistrate - Matters heard before Mag. Schiffman - Report submitted to Judge Judd with the file. (motions for discovery proceedings)
3/26/75	Notice of motion for discovery,inspection,etc. filed- Memorandum from Magistrate Schiffman and response of Govt to request of bill of particula etc. filed (McLenan)
4-7-75	Affidavit of IRA LONDON filed (recvd from Chambers)
4-7-75	Before JUDD, J - case called - defts present - counsel for deft McLenan present, Herbert Handman; counsel for deft Inness not present)Ira London case adjd to 4-14-75 for hearing as to deft Inniss and for trial after conclusion of US vs.Cruz, 75 CR-130
4-9-75	By JUDD, J -Memorandum and Order filed on motion of deft Inniss to quash a subpoena; for discovery and one by the Govt to disqualify Ira London from representing the deft etc. It Is Ordered that the motion to quash the subpoena for defts passport be denied; that the report of the Magistrate concerning the discovery motion be confirmed; that Ira London be directed to file an affidavit by 4-11-75 stating who paid the retainer for him to represent Manuela Cortes-Canate and the date and

74 CR--791
CRIMINAL DOCKET

DATE	PROCEEDINGS
	amount of retainer, and the extent of his investigation in the matter before he submitted her guilty plea; and that a hearing be held in court at 10:00 A.M. on 4-14-75 at which Mr. Inniss shall be present and state whether he/still wishes to be represented by Mr. London and that decision on the motion for disqualification be deferred until after that hearing.
4-14-75	Affidavit of IRA D. LONDON filed.
4-14-75	Before JUDD, J - case called & adjd to 4-21-75 at 10:00 am
4-21-75	Affirmation of IRA D. LONDON filed.
4-21-75	Before JUDD, J - case called - defts Inness & Gertrude McLenan present - adjd to 4-25-75 for hearing & to 4-28-75 for trial.
4-25-75	Before JUDD, J - case called - defts Inniss & Gertrude McLenan present - counsel for deft INNISS present, Ira London; counsel for deft McLenan not present - possible conflict of interest on be half of Mr. London to be resolved informally with Asst. U.S. Atty. David De Petris - Govts application to have deft Inniss' passport turned over to Clerk of the Court - Motion argued and motion granted - Deft Inniss' passport to be turned over to Clerk of Court as a condition of bail on 4-28-75 - case adjd to 4-28-75 at 10:00 am for trial.
4/28/75	Before JUDD,J.- Case called- Defts and counsel present-Deft McLenan's motion to ~~xxx~~ relieve Mr. Handman as counsel-motion denied- deft Innes passport and alien card turned over th court as directed as part of bai condition-court direats that passport and alien card be sealed in vaulty by theClerk-Case adjd to 5/13/75 at 10:00 A.M. for trial
5/7/75	Before JUDD,J.- Case called- counsel present-deft not present-Mr. Londo motion to be relieved as counsel-motion granted-deft INNISS to secure new counsel by 5/13/75
5-13-75	Before JUDD, J - case called - adjd to May 14, 1975 for trial
5-14-75	Notice of Appearance filed (INNIS)
5-14-75	Before JUDD, J - case called - defts & counsels present - Marvin Preminger submitted as counsel for deft INNIS - case adjd to May 19, 1975 for trial
5-19-75	Before JUDD, J - case called - defts & counsels present - deft McLenan's motion to have Govt turn over her work permit card - motion granted - adjd to July 7, 1975 for trial.
7/7/75	Before JUDD,J.-Case called Deft INNESS and MCLEAN present with counsel Trial ordered and begun-jurors selected and sworn-trial contd to 7/8/7

DATE	PROCEEDINGS
7/8/75	Before JUDD,J.- Case called- Defts and counsel present-Trial resumed- Trial contd to 7/9/75 at 10:00 A.M.
7/9/75	Before JUDD,J.- Case called- Defts and counsel present-Trial resumed Govt rests-defts motion to dismiss argued- motion denied-Deft Innis rests trial contd to 7/10/75 at 10:00 A.M.
7/10/75	Before JUDD,J.- Case called- Defts and counsel present-Trial resumed- Trial contd to 7/14/75 at 10:00 A.M.
7/11/75	Stenographers Transcript dated 7/7/75 filed
7-14-75	Before JUDD, J - case called - defts & counsels present - trial resumed - Both defts rest - Govt opens on rebuttal - Govt rests on rebuttal - trial contd to July 15, 1975.
7/15/75	Before JUDD,J.- Case called- Defts and counsel present-Trial resumed All sides rest- Defts sums up - Govt sums up- Trial contd to 7/16/75 at 10:00 AM.
7-16-75	Before JUDD, J - case called - defts & attys present - trial resumed - Govts summation contd - Judge charged Jury - Marshals sworn - alternates discharged - Order of sustenance signed - Jury retires to deliberate at 12:05 PM - Jury returns at 3:25 PM and renders verdict of guilty as charged on all counts as to both defts - Govts motion to have deft INNESS remanded - Motion argued and motion granted - Govts motion to increase bail of deft McLENAN - motion argued and motion granted - bail increased to $30,000.00 surety bond to be posted by July 18, 1975 at 12 Noon with condition that deft surrender her seaman's card to the Clerk of the Court. Case adjd to August 1, 1975 for sentence.
7-16-75	By JUDD, J - Order of sustenance filed (Lunch)
7-16-75	Stenographers transcript filed dated July 8, 1975 (pgs 103 to 271)
7-16-75	Govts Requests to Charge filed.
7/18/75	Before JUDD,J.- Case called- Deft McLenan present-Govt ounsel present- counsel not present-Deft's motion for reduction of bail granted on consent Deft's bail set at $20,000.00 surety bond plus $3,000.00 cash already in possession of Clerk of court in form of bank book- Bail tobe posted by 7/22/75 at 12:oo P.M.
7-29-75	Before JUDD, J - case called - deft McLenan present - AUSA David De Petris present - Govts motion to have Clerk of the Court release deft McLenan's Seaman's Card to AUSA De Petris granted on consent.
8-1-75	Before JUDD, J - case called - defts INNISS & McLENAN present with attys - Deft INNISS sentenced to imprisonment for 8 years plus 5 years special parole to run concurrent on counts 1 and 3 pursuant to 18:4208(a)(2)with

74 CR--791

CRIMINAL DOCKET

DATE	PROCEEDINGS
	eligibility for parole after one year - deft advised of right to appeal - defts motion for setting of bail argued - bail set at $75,000 surety bond. Deft MC LENAN sentenced to imprisonment for 8 years plus spsecial parole term of 5 years to run concurrent-on counts 1, 3 & 5 pursuant to 18:4208(a)(1) with eligibility for parole after 1 year. Execution of sentence stayed pending appeal. Deft advised of right to appeal - bail conditions contd.
8-1-75	Judgment & Commitments filed for defts MC LENAN & INNISS - certified copies to Marshal and Probation
8/5/75	Judgment and Commitment retd and filed. Executed. (R. Inniss)
8-7-75	Notice of Appeal filed (MC LENAN)
8-7-75	Docket entries and duplicate of Notice of Appeal mailed to Court of Appeals (MC LENAN)
8-11-75	Notice of Appeal filed (INNISS)
8-11-75	Docket entries and duplicate of Notice mailed to C of A
8-21-75	Order filed received from the Court of Appeals that the Record be docketed on or before Sept. 2, 1975.
9-2-75	Record on Appeal certified and mailed to the Court of Appeals (INNISS)
9-10-75	Acknowledgment received from the Court of Appeals for Record on Appeal (INNISS)
12-18-75	5 stenographers transcripts filed (one dated 4-7-75; one dated 4-21-75; one dated 4-28-75 and 2 dated 8-1-75.)
12/22/75	Stenographers Transcript dated 4/14/75 filed
1/19/76	Stenographers Transcript dated 5/19/75 filed
1-26-76	11 volumes of stenographers transcripts filed.
2-4-76	Voucher for Expert Services filed.
2/23/76	Stenographers Transcript dated 4/21/75 filed
3/1/76	Scheduling order received from court of appeals and filed

A true 3/16/76
Copy Attest

BJF:DAD:bj
F# 743,659

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IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
DEC 17 1974
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

RICARDO INNISS, a/k/a "Ricky",
GERTRUDE MC LENAN, a/k/a "Peaches" and
ROBERTO ALVAREZ,

Defendants.

- - - - - - - - - - - - - - - - - - X

Cr.No. _____
(T.21, U.S.C., §§841(a)(1), 846, 952(a), 959, 960(a)(1), 963 and T.18, U.S.C., §2)

74CR 791

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between February 1974 and June 1974, within the Eastern District of New York and elsewhere, the defendants RICARDO INNISS, also known as "Ricky", GERTRUDE MC LENAN, also known as "Peaches" and ROBERTO ALVAREZ, together with Manuela Cortes-Canate and Marie Fernandez, herein named as co-conspirators but not as defendants, and others known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Sections 841(a)(1), 952(a) and 960(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally import into the United States from places outside thereof, substantial quantities of cocaine, a Schedule II narcotic drug controlled substance.

2. It was further a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute substantial quantities of cocaine, a Schedule II narcotic drug controlled substance.

3. It was further a part of said conspiracy that the defendant and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed within the Eastern District of New York and elsewhere:

OVERT ACTS

1. In or about February 1974, the defendants INNISS and MC LENAN met with co-conspirator Cortes-Canate in Panama.

2. On or about March 6, 1974, the defendants INNISS, MC LENAN and co-conspirator Cortes-Canate travelled from Panama to Barranquilla, Columbia.

3. On or about March 6, 1974, the defendants INNISS, MC LENAN and co-conspirator Cortes-Canate met with defendant ALVAREZ and co-conspirator Fernandez in Barranquilla, Columbia.

4. On or about March 12, 1974, the defendant ALVAREZ delivered approximately one (1) kilogram of cocaine to the defendants INNISS, MC LENAN and co-conspirator Cortes-Canate.

5. In or about May 1974, the defendants INNISS and MC LENAN met with co-conspirator Cortes-Canate in Brooklyn, New York.

6. In or about late May 1974, the defendant ALVAREZ delivered approximately one (1) kilogram of cocaine to co-conspirators Cortes-Canate and Fernandez in Barranquilla, Columbia.

7. On or about the 1st day of June 1974, the defendant MC LENAN and co-conspirator Cortes-Canate arrived at John F. Kennedy International Airport, Queens, New York. (Title 21, United States Code, Sections 846 and 963).

COUNT TWO

On or about the 12th day of March 1974, at Barranquilla, Columbia, the defendant ROBERTO ALVAREZ did distribute, approximately one (1) kilogram of cocaine, a Schedule II narcotic drug controlled substance, at the time knowing that said substance would be unlawfully imported into the United States. (Title 21, United States Code, Section 959).

COUNT THREE

On or about late March 1974, within the Eastern District of New York, the defendants, RICARDO INNISS, also known as ""Ricky" and GERTRUDE MC LENAN did knowingly and intentionally possess with intent to distribute approximately one (1) kilogram of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, section 2).

COUNT FOUR

On or about late May 1974, in Barranquilla, Columbia, the defendant ROBERTO ALVAREZ, did distribute, approximately one (1) kilogram of cocaine, a Schedule II narcotic drug controlled substance, at the time knowing that said substance would be unlawfully imported into the United States. (Title 21, United States Code, Section 959).

COUNT FIVE

On or about the 1st day of June 1974, within the Eastern District of New York, the defendant GERTRUDE MC LENAN, also known as "Peaches", and co-conspirator Manuela Cortes-Canate, did knowingly and intentionally import approximately one (1) kilogram of cocaine, a Schedule II narcotic drug controlled substance, into the United States from Panama. (Title 21, United States Code, Sections 952(a), 960(a)(1) and Title 18, United States Code, Section 2).

A TRUE BILL

E. G. Stuhle
FOREMAN

David G. Trager
DAVID G. TRAGER
United States Attorney
Eastern District of New York

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FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
APR 9 1975
TIME A.M.....
P.M.....

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

- against -

RICARDO INNISS, a/k/a "Ricky,"

Defendant.

- x

M'FILMED

74 CR 791

April 9, 1975

Appearances:

HON. DAVID G. TRAGER
United States Attorney
Attorney for United States of America

By: EDWARD R. KORMAN, Esq.
Chief Assistant U. S. Attorney
and
DAVID A. DePETRIS, Esq.
Assistant U. S. Attorney
of Counsel

IRA D. LONDON, Esq.
Attorney for Defendant.

J U D D, J.

MEMORANDUM AND ORDER

In connection with an indictment for conspiracy to import and distribute cocaine, there are pending three motions one by defendant Inniss to quash a subpoena served on his attorney for the production of his Panamanian passport,

another by defendant Inniss for discovery of various types, and one by the government to disqualify Ira London, Esq. from representing the defendant.

Facts

1. Mr. Inniss' passport was delivered to his attorney by his sister when the court directed its surrender as a condition for his release on bail. At the time the bail was fixed, the court permitted the passport to remain in the custody of the attorney, pending determination of the government's right to use the information it might contain.

The passport is significant to the United States, to show prior entries into the United States which may corroborate the anticipated testimony of an accomplice witness. Evidence of such entries may not be readily obtainable in other ways. Mr. Inniss is a permanent resident of the United States and has been here since 1960.

Defendant asserts that the passport is protected by the Fourth and Fifth Amendments against the production of personal papers which may tend to incriminate.

2. The discovery motion was referred to Magistrate Max Schiffman, who filed a report on March 26, 1975 disposing of all its features. No objection to his recommendations has been filed by either party.

3. A Venezuelan citizen named Manuela Cortes-Canate is expected to be the key witness against the defendant. She was arrested on June 1, 1974 at John F. Kennedy Airport in the act of bringing a kilogram of cocaine into the United States from Barranquilla, Colombia. Legal Aid Society was appointed by Magistrate Catoggio to represent her, and one of their attorneys appeared for her on June 20, 1974 and entered a not guilty plea to the indictment, which had been handed down in the meantime.

On August 16, 1974 Ira London entered a notice of appearance for Mrs. Cortes-Canate. Defendant Ricardo Inniss had been arrested in August, 1974 on a state narcotics charge, which was subsequently reduced to a misdemeanor. Mrs. Cortes-Canate says that Mr. London turned up at Rikers Island where she was confined and said that he had been retained as her attorney. He did not say who paid his fee. Mrs. Cortes-Canate being in jail, the court had set September 9 as a date

for trial. Mr. London appeared in court on September 9 to present a motion for discovery and to ask for an adjournment. He was also present with her on September 19, 1974, when she pleaded guilty to the indictment.

Before the date for sentence, Mrs. Cortes-Canate asked that Mr. London be relieved as her counsel and that the court appoint a new attorney. She was produced in court on October 16 and questioned by the court. Legal Aid Society was then re-appointed to represent her. Mr. London was not notified of the hearing or of the appointment of counsel until the following month, because Mrs. Cortes-Canate did not want him to know of her intended cooperation with the government. She testified before the grand jury. Her sentence date was postponed pending her testimony against Mr. Inniss. She was sentenced on April 4, 1975 to 15 months imprisonment, plus three years Special Parole Term. The court directed that she continue to be held in this country as a material witness before any deportation, even though she may have attained the time for mandatory release.

Mr. Inniss stated that he paid Mr. London a fee and wants Mr. London to represent him, and he has expressly

waived any objection to Mr. London's possible conflict of interest. Mr. London asserts that there was so little attorney-client relationship with Mrs. Cortes-Canate that he possesses no privileged communications which would be used in her cross-examination. He obtained no written statements from her.

The United States has submitted an opinion of the Committee on Professional Ethics of the Brooklyn Bar Association, rendered in another matter, that it is improper for an attorney to represent a second defendant if he also represents a co-conspirator who has pleaded guilty and is awaiting sentence, after providing information that led to the indictment of the second defendant. The Committee stated that this rule applies even though the attorney had represented the second defendant previously in other matters. Mr. London is not a member of the Brooklyn Bar Association, according to its current year-book.

The government also asserts that it may call Mr. London as a witness to testify whether Mr. Inniss paid him the retainer for his temporary representation of Mrs. Cortes-Canate.

Discussion

1. The Passport

There is no Fourth Amendment privilege for Mr. Inniss' passport, since the government could obtain a search warrant on the basis of information that the passport may contain evidence pertinent to the pending indictment.

The Fifth Amendment privilege extends to documents, if a person owns them, and has them in his possession, and they are self-incriminating. United States v. Falley, 489 F.2d 33, 41 (2d Cir. 1973). The Falley case also holds that there is no Fifth Amendment privilege for a United State passport, since it is the property of the United States by law and not that of the defendant.

The requirement of possession by the defendant is met here, even though the passport came into the possession of his sister and is now in the possession of his counsel. This is not like the possession of business and tax records by an accountant, as in Couch v. United States, 409 U.S. 322, 328, 93 S.Ct. 611, 616 (1973). In the first place, an attorn is in a different category from an accountant. In the second

place, the transfer of possession here was made while defendant was in custody and for the purpose of supporting his constitutional right to be freed on bail. Compare Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968).

The law of Panama as described by the government is that a passport is "a public traveling document" which may be confiscated when there is reason to believe that it has been misused in any way and which is subject to seizure by the police and is admissible in evidence when it is used in connection with a crime (Article 2056 of the Judicial Code of Panama). If the passport would be subject to seizure by the Panama police and use in evidence there, there is no injustice in permitting its use in evidence here.

Moreover, a foreign passport is not really a personal document. It is subject to inspection at the time of any entry into the United States. The provisions of 8 U.S.C. § 1182(26), cited by the government, apply only to nonimmigrants, but the regulations clearly require even permanent residents to show their passports at each entry.

At any event, an alien's passport is a type of public record, which aids in establishing his rightful presence in the United States, and therefore is outside the scope of Fifth Amendment privilege under Shapiro v. United States, 335 U.S. 1, 32, 68 S.Ct. 1375, 1391 92 (1948).

2. Discovery

The statute expressly sanctions the use of Magistrates to assist the courts in discovery in criminal matters. 28 U.S.C. § 636(b)(2). In the absence of any objections, his report should stand.

3. Disqualification

If Mr. London's testimony is necessary in this case, he should not act as trial attorney for Mr. Inniss. Code of Professional Responsibility DR5-101, 5-103.

It is clear that Mr. London may be compelled to tell who paid the retainer for him to represent Mrs. Cortes-Canate. Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 U.S. 951, 83 S.Ct. 505 (1963); United States v. Franzese, 392 F.2d 954, 963-64 (2d Cir. 1968).

The extent of Mr. London's representation of Mrs. Cortes-Canate appears to be less than that of the attorney in the Brooklyn Bar Association opinion. He did not represent her at the time she was cooperating with the government nor at her sentencing. A court should not condone a violation of the Code, but it should not interfere with the free choice of an attorney where the ethical violation is not clear. The government cites no case in which an attorney selected by a criminal defendant has been disqualified. United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973) is different, since that involved the same attorney representing two defendants at the same trial.

Mr. Inniss should be given another opportunity, however, to say whether he still wants to be represented by Mr. London, given the possibility that evidence at the trial will show that he paid Mr. London to represent Mrs. Cortes-Canate before she began cooperating. Should he choose to engage other counsel, the fact that he has already paid Mr. London the fee should not be an obstacle, for the court may require a refund of the part that has not been earned.

It is ORDERED:

(1) That the motion to quash the subpoena for defendant's passport be denied;

(2) That the report of the Magistrate concerning the discovery motion be confirmed;

(3) That Ira London, Esq. be directed to file an affidavit by April 11, 1975 stating who paid the retainer for him to represent Manuela Cortes-Canate, and the date and amount of the retainer, and the extent of his investigation in the matter before he submitted her guilty plea; and

(4) That a hearing be held in the court at 10:00 A.M. on April 14, 1975, at which Mr. Inniss shall be present and state whether he still wishes to be represented by Mr. London, and that decision on the motion for disqualification be deferred until after that hearing.

U. S. D. J.

little less, maybe.

(A recess is taken.)

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

THE COURT: We are missing one lawyer.

THE CLERK: Here he is.

J U D D, U.S.D.J

(THE COURT CHARGES THE JURY AS FOLLOWS:)

THE COURT: The people at counsel table and Mr. Weiner and members of the jury:

My remarks are directed primarily to you. You have heard the evidence and the arguments of counsel and it is now my duty to give you instructions as to the law which is to be applied in judging this case.

You have been attentive and patient. We have had about four and a half days of testimony and a solid day of argument as to what the testimony means. And now you are about to come to the decisive point where you determine where the truth lies in the case as best as humans can do it.

In my instructions I will apply first the general principles that apply to all criminal trials, then the nature of the charges in this case, and then the specific rules of law that apply to those charges and something about how to evaluate the evidence you have heard, a few comments on the evidence briefly, and finally something about how you should reach a verdict.

In our adversary system of criminal justice it is the duty of the prosecutor to do his best to present the Government's case. And defense counsels' duty is to do their best to represent their own client's interests.

The Court and the jury are supposed to be impartial. The Court enforces the rules of evidence and the jury decides the truth or falsity of the testimony and the inferences that should be drawn from the evidence.

It is your duty as jurors to follow the law as I describe it in my instructions and to apply those rules of law to the facts as you find them from the evidence in the case.

You are the sole judges of the facts.

You are to perform your duty without bias or prejudice for or against any party or any witness. The law does not permit jurors to be governed by sympathy or prejudice or public opinion.

The law presumes that a defendant is innocent of crime and the law permits nothing but legal evidence presented before a jury be considered in support of a charge against an accused. The presumption of innocence is enough in and of itself to acquit a defendant, unless twelve jurors are satisfied beyond a reasonable doubt of the guilt of the individual defendant on a particular count from all the evidence in the case. And the Government has the burden of that proof.

I will just say a few words about what the law means by a reasonable doubt.

We start with the words, a reasonable doubt is a doubt based on reason and common sense. It may arise from the state of the evidence or it may arise from the absence of

evidence. A reasonable doubt does not mean that a doubt that a juror asserts arbitrarily and capriciously because he doesn't want to undertake an unpleasant task. It doesn't mean beyond a possible doubt. It is rarely possible to prove anything to an absolute certainty and the law doesn't require this.

What is sometimes used as a way of defining it is that proof beyond a reasonable doubt refers to the type of doubt that would make you hesitate to act in your own important affairs.

This proof beyond a reasonable doubt operates on the whole case. It doesn't mean that each bit of evidence must be proved beyond a reasonable doubt. It means that when you consider the sum total of all the evidence, if you are satisfied beyond a reasonable doubt as to each element of the crime charged, you must convict. And if you have any reasonable doubts to any element as to any count you must acquit. And I will tell you about the elements of the counts shortly.

Finding a person to be guilty of a felony

and subjecting him or her to criminal penalties is serious and you will consider this fact in determining whether you have a reasonable doubt. Nevertheless, if you are convinced beyond a reasonable doubt of the defendant's guilt you should find him guilty and not be swayed by sympathy.

An indictment is just a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused and it does not create any inference of guilt.

The defendants have both pleaded not guilty. The indictment and these pleas create the issues which you must decide.

The law never imposes a duty on the defendant in a criminal case to produce any evidence. A defendant may present himself as a witness, as Miss McLenan did in this case. In that event she becomes subject to cross-examination as you have observed, and her credibility is for you as the jury to determine in the same manner as other witnesses.

You may consider that a defendant has a strong motive to lie to protect herself, but

you may also consider there is a real risk in subjecting herself to cross-examination. So you determine how much of the testimony you believe.

The fact that Mr. Inness did not testify does not create any inference. He has a right to rely on his counsel's belief or his belief that the Government's case leaves at least a reasonable doubt as to his guilt. And you can't even talk in the jury room about the fact that he did not testify.

We have two separate cases and each defendant may handle their case as they see fit.

I am going to read the indictment in this case so that you have the precise thing that were charged, although as I say, this is only the charge.

Count one charges that on or about and between February 1974 and June 1974 within the Eastern District of New York and elsewhere--and the Eastern District of New York is also Brooklyn, Queens, Long Island and Staten Island--the defendants Ricardo Inness, also known as

Ricky, Gertrude McLenan, also known as Peaches, and Roberto Alverez together with Manuela Cortez-Cunate and Maria Fernandez, herein named as co-conspirators but not as defendants, and others known and unknown to the Grand Jury did knowingly and intentionally combine, conspire, confederate and agree to violate Sections 841, 952A and 962A of Title 21 of the United States Code..

And then the descriptions, one, it was part of said conspiracy that defendants and co-conspirators would knowingly and intentionally import into the United States from places outside thereof substantial quantities of cocaine, a schedule 2 narcotic drug and controlled substances; and, too, it was part and party of a said conspiracy that defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute substantial quantities of cocaine; three, it was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps to

design and to prevent disclosure of their activity.

In furtherance of the conspiracy and to effect the objects thereof the following overt acts among others were committed within the Eastern District of New York and elsewhere.

One, on or about February 19th, 1974, the defendants Inness and McLenan met with co-conspirator Cortez-Cunate in Panama; and, two, on or about March 6th, 1974, the defendants Inness and McLenan and co-conspirator Cortez-Cunate travelled from Panama to Barranquilla, Colombia; three, on or about March 6th, 1974, the defendants Inness and McLenan and co-conspirator Cortez-Cunate met with defendant Alverez and co-conspirator Fernandez in Barranquilla, Colombia; four, on or about March 12th, 1974, the defendant Alverez delivered approximately one kilogram of cocaine to the defendants Inness, McLenan and co-conspirator Cortez-Cunate; five, in or about May 1974 the defendants Inness and McLenan met with co-conspirator Cortez-Cunate in Brooklyn, New York;

six, in or about late May 1974 the defendant Alverez delivered approximately one kilogram of cocaine to co-conspirator Cortez-Cunate and Fernandez in Barranquilla, Colombia; seven, on or about the first day of June 1974 the defendant McLenan and co-conspirator Cortez-Cunate arrived at John F. Kennedy International Airport, Queens, New York.

And I omit the counts dealing with Mr. Alverez and I read count three which we call a substantive count.

On or about late March 1974 within the Eastern District of New York the defendants Ricardo Inness also known as Ricky and Gertrude McLenan did knowingly and intentionally possess with intent to distribute approximately one kilogram of cocaine, a schedule two narcotic drug controlled substance.

And here the reference is to Title 21 of the United States Code, Section 841A-1, and also to Title 18, United States Code, Section 2.

And the final count charges that on or

about the first day of June, 1974, within the Eastern District of New York the defendant Gertrude McLenan also known as Peaches and co-conspirator Manuela Cortez-Cunate did knowingly and intentionally import approximately one kilogram of cocaine into the United States from Panama.

Now, the dates, and the amount in the indictment don't have to be accurate. They may be approximate, as long as they afford the defendants sufficient information so that they can prepare for trial. And similarly the fact that the overt acts in the indictment describe delivery of cocaine as taking place in Barranquilla instead of Cartegna, Colombia, is not a material variance. If you find that cocaine was in fact received, it would be all right in either place.

The conspiracy count is based on Section 846 as well as Section 841 of the Drug Abuse Control Act which says that any person who attempts or conspires to commit any offense defined in this sub-chapter is

punished by imprisonment, fine or both, which may not exceed the maximum punishment prescribed for the offenses.

And one Section of the chapter is Section 841A-1, which says, except as authorized by this chapter it shall be unlawful for any person knowingly or intentionally to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance.

Controlled substances are defined in Chapter 812 of Title 21 of the United States Code, and that includes as a controlled substance coca leaves (phonetic spelling) and salt compound derivative or preparation of coca leaves. Cocaine is made from coca leaves which should not be confused with coco leaves, which are two different plants.

The word distribute in the statute is also defined to be delivered. So the statute defines distribute not simply delivered to persons who sell cocaine in the streets to a lot of people, but to those who turn over

any quantity of a narcotic drug or a forbidden substance to another person.

And the indictment also refers to Section 952, which says it shall be unlawful to import into the United States from anyplace outside thereof any controlled substance in Schedule 1 or 2 of Subchapter 1 of this chapter.

And then Section 960 says that any person who contrary to Section 952 knowingly or intentionally imports or exports a controlled substance shall be punished as provided in Sub-Section B of this section.

You have heard a bit about what the potential penalties are and I will not review them now because that is a matter for the Court to decide on the basis of a presentence report and further appearances by counsel if there is a conviction. It is not a concern of the jury.

I referred also to Section 2 of Title 18 of the United States Code which is mentioned in the second and third count of the indictment. That says that whoever commits an offense

against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. That means that someone who helps in the commission of a crime is just as guilty as the one who does it himself. Someone who helps to import or possess or distribute cocaine is just as guilty as if he had done it himself. But helping means helping and conspiracy means conspiring. It does not mean just being around the place where the crime takes place. There is an obligation if you are aware of the commission of a felony to report it to the authorities. But that is not what anybody is charged with here in order to be guilty of conspiring or aiding and abetting.

A phrase frequently used, someone must have a stake in the venture. He or she must want to see the offense committed and must do something to help it take place affirmatively.

Now, the indictment alleges and the statute requires it to allege that the offenses here were committed knowingly and

intentionally.

An act is done knowingly if it is done voluntarily and not because of mistake or accident or other innocent reason.

The word intentionally pretty well overlaps knowingly. The purpose of the word knowingly is to insure that no one will be convicted for acts done because of mistake or accident or other innocent reason.

The transaction is not intentional unless it is knowing.

The first count of the indictment refers to conspiracy. And in connection with such a charge there are three essential elements which must be established.

First, that there was an agreement to import or distribute cocaine; second, that a particular defendant willfully became a party to that agreement; and third, that some member of the conspiracy did some act in furtherance of the conspiracy.

Only one overt act is necessary in order to establish that. It doesn't matter which conspirator did it as long as it is pursuant

to and in the existence of an agreement between individuals to violate the law.

The agreement does not have to set down in writing. It does not have to be explicitly set forth because conspirators act to some degree in secret. And you can infer the agreement exists from the evidence in the case or you can infer the agreement does not exist.

It is not necessary that a conspiracy be successful. The doing of a conspiracy or performance of an act--and some of the acts you may well know are innocent acts as travelling from Panama to Colombia, which is separate from the receiving of cocaine.

So as a matter of law if the parties thought they were buying cocaine and they thought they were going to distribute cocaine in the United States after they got it here, it does not matter that there is no chemical analysis to show that the package alleged to have been brought in in March of 1974 was in fact cocaine. The question is whether there was a conspiracy to bring in cocaine.

With respect to the second count, which is possession with intent to distribute, there are two types of possession, what is called actual possession and constructive possession.

Miss Cunate--I think that is her surname under the Spanish tradition--had the cocaine in her possession in June. She said she had it almost all the time except when she alleges that Miss McLenan brought it across the border on the first venture so that it wouldn't be lost if the illegal immigrants werecaught at the border.

Having it in your hand or in your pocketbook with you is in actual possession. Having power to tell somebody who has the actual possession how to dispose of it or what to do with it is what we call constructive possession.

So if Miss McLenan was holding it for the benefit--if Miss Cortez was holding for the benefit of Miss McLenan or for the purpose of Mr. Inness being able to sell it, they may have had constructive possession of it within the meaning of the second count being

submitted to you on the indictment.

With respect to the third count -- oh, with respect to intent to distribute, when there is a substantial amount of cocaine more than one person is likely to use for his own personal needs, you may infer that there was an intent to pass it along to somebody else, an intent to distribute. You need not infer such an intent. That is within your power.

With respect to the third element, the third count that is being submitted to you, importation, there are two elements: first knowledge that the substance was cocaine.

And on the third count it is important that the Government prove beyond a reasonable doubt that it was cocaine.

And second, that it was brought into the United States or attempted to be brought into the United States.

And here there is evidence that the exhibit 1, I guess it is, the package of cocaine, lidocaine and lactose was brought at least so far as the customs tables at John F. Kennedy Airport.

There has been discussion about the legality of lidocaine. That is not a basic element of the charge. But it goes to some of the collateral issues that were discussed at the trial.

And the New York Law since 1971 has said that a person is guilty of criminally using drug paraphernalia in the second degree when he knowingly possesses or sells diluents, dilutants or adulterants, including but not limited to any of the following: quinine hydrochloride, mannitol, mannite, lactos or dextrose, adapted for the dilution of narcotic drugs or stimulants under circumstances evincing an intent to use, or under circumstances evincing knowledge that some person intends to use the same for purposes of unlawfully mixing, compounding, or otherwise preparing any narcotic drug or stimulant.

Lidocaine is not specifically mentioned in that section and it was possible that the witnesses were in some honest disagreement as to whether the section covered lidocaine

or not. The evidence here is that it was used as a dilutant in the cocaine that was seized on the June venture.

The burden is on the Government to prove each of the essential elements of a count beyond a reasonable doubt. You can't infer the existence of one element from the fact of another element proved.

This burden rests on the Government throughout the trial and never shifts on the defendant. If you have a reasonable doubt as to any element of any count you must acquit, just as you have a duty to convict if you are persuaded beyond a reasonable doubt.

Now, some rules on evaluating evidence.

There are, generally speaking, two types of evidence from which a jury can find the truth of facts in a case. One is direct evidence like the testimony of an eyewitness. The other is indirect or circumstantial evidence, which is the proof of a chain of circumstances that logically point to the existence or non existence of certain facts.

Example of direct evidence in Miss

Cortez' testimony that she handed cocaine to Miss McLenan and that she had it with her in the apartment.

And then Miss McLenan's testimony that she never had any cocaine in her possession and knew nothing about it.

Examples of circumstantial evidence are the fact that the Mexican visas were all obtained together after the cocaine had been purchased in Colombia and the fact that there was a birth certificate of a Mrs. Perez used by Mr.--by Miss Cortez, and Miss Perez had at one time travelled into the United States with Mr. Inness, if you believe the evidence.

And contra, the fact that Mr. Inness was going to Panama for the carnival and as a matter of fact Ash Wednesday in 1974 was on March 27th, I think. So a few days before there was the carnival and it may be some evidence he was not going to buy cocaine.

And the fact that Miss McLenan was on the ships in June, July or August in 1973 maybe some circumstantial evidence that she did not

sell cocaine to Mr. Welch during the time they said he did.

You can sometimes draw more than one inference from a particular piece of circumstantial evidence. And it is up to you to decide which inference is most logical in the light of all the other evidence in the case.

As a general rule the law makes no distinction between direct and circumstantial evidence. Circumstantial evidence need not exclude every reasonable hypothesis of innocence in order to establish guilt. What is necessary is that a jury be satisfied of a defendant's guilt beyond a reasonable doubt on the basis of all the evidence in the case, both direct and indirect, or else you must acquit.

Circumstantial evidence may be enough to convict all by itself if you find the defendant guilty beyond a reasonable doubt on the whole case.

When you are analyzing the evidence including the circumstantial evidence you can

draw reasonable inferences based on your own common sense and general experience, but only from facts that you find are proved. And you are not confined to the bare bones of the testimony but you can't speculate or guess. And there is a line--not a bright line, but an important line--between speculating as to what evidence might be and as to drawing inferences what one piece of evidence shows with respect to probability.

Now, I come to the question of credibility of witnesses. That's one of your very important and difficult tasks. And it is the theory of American justice that twelve citizens selected as a cross-section of the community and screened as far as possible to avoid any preconceptions can best determine the truth of a charge.

When you weigh the testimony of various witnesses you can consider their relationship to the Government, to any defendants, their bias, their interest in the outcome of the case. It is important to consider their manner while testifying, their candor and

intelligence as you have observed it, the probability or improbability of their testimony in relation to other testimony in the case.

You can consider also the extent to which any testimony has been corroborated or contradicted by other credible evidence. You may consider inconsistencies within the testimony of any witness, either on direct or cross-examination, and whether any witness has changed his testimony.

If you are convinced that a witness has lied you can say you won't believe anything the witness has said or you can say that part of what the witness said is true and part is not. And the same thing with respect to inconsistencies.

A witness may have been mistaken or untruthful with respect to part of the testimony and be correct with respect to other parts. That's for you to determine.

And when it comes to inconsistencies or facts which you think were not truthfully stated you should consider whether they

relate to a detail or to an important part of the testimony.

You can consider your own experience with the extent to which repetitions of the same story or descriptions of the same event by more than one person may vary in detail and whether such variations indicate falsehood or inaccurate memory or have some other explanation.

Imagine yourself sitting on the witness stand trying to say what happened during your last vacation trip during 1974 and whether you can get all the sequences of events straight, bearing in mind the burden of proof beyond a reasonable doubt is on the Government.

You can evaluate the testimony of a defendant, consider her personal interest in the result of the case. Also consider that no one else but Miss McLenan could say what happened during the times when she was with Miss Cortez. And apply to Miss McLenan's testimony all the same tests such as credibility which you use in judging other

witnesses.

We have had some Government Agents here. There is a role with respect to them, that you are not to give any greater weight or credibility to the testimony of a witness solely because of the fact that he is a Government Agent. And you don't give it any less on that account. You evaluate the testimony of the Government Agent in the same way as you would evaluate the testimony of other witnesses.

There are special rules with respect to what are called accomplices, which include Miss Cortez and Mr. Welch.

An accomplice is somebody who has participated in the crime that is on trial.

The law does not prohibit the testimony of accomplices or whether you approve of their use is not to enter into your considerations of the case.

In certain types of crimes the Government is frequently compelled to rely on the testimony of accomplices or persons with criminal records. It has to take the witnesses

to the transaction as they are. There is no requirement that the testimony of an accomplice be corroborated. A conviction may rest upon the uncorroborated testimony of such witness if it is found credible beyond a reasonable doubt.

Here there is corroborating testimony, at least with respect to details that the Government has mentioned. But an important rule is that the testimony of an accomplice should be viewed with great caution and scrutinized carefully before you determine whether to accept it. And that applies to both Miss Cortez' testimony and to Mr. Welch's testimony.

You can also consider the question of motivation.

Miss Cortez may have had a motivation to implicate Miss McLenan and Mr. Ricardo Inness at the time she was cooperating with the Government. She has less now because she is sentenced and knows what will happen to her.

Mr. Welch is awaiting sentence and he

may have a motive to help the Government. You may consider that in determining the extent you wish to give to the credibility of both of them.

It is a serious thing to lie somebody else into jail and you should determine as to whether each of these two witnesses were in fact doing that.

A couple of other things which I think you should consider in this connection: We don't believe in this country in guilt by association. And the fact that Mr. Inness or Miss McLenan were with Miss Cortez at various times is not in itself enough to prove guilt. It may create inferences which leads to your finding that there is conspiracy or that there is aiding and abetting. But mere presence is not sufficient.

Now, there was discussion about why the passports were made available.

The law in the United States as I have ruled on it is that a passport is a public document and it must be produced. It is something that the defendant can keep to himself.

There is no way of knowing whether the defendants knew this at the time that Mr. Inness' passport was provided or that Miss McLenan's passport was lost. But it is one of the factors of law in considering with what the collateral issue is on the trial here.

Finally I mentioned you are not to decide the case or any issue of fact on the basis of the number of witnesses or the number of exhibits.

The bulk of testimony was by the Government. I don't know how the bulk of cross-examination went, but your decision in any rate depends on the quality of the testimony and not on the quantity that either side produced.

With respect to objections and rulings as to testimony or exhibits you shouldn't try to guess on the answer if I didn't let it come in and you should disregard any evidence that I struck out and consider the case only on the testimony and the exhibits which came in without objection and the stipulations of the

parties that have been placed on the record.

A federal judge has the right to comment on the evidence. In fact, I can marshall the whole evidence and I can spend half the day reviewing my recollection of what took place. But you have heard about two hours and three quarters by the defendant, and two hours and a quarter by the Government and I think you have had enough on that.

Just a few things that seem to me significant, and these illustrate the differences that can be drawn with respect to inferences.

When Miss McLenan was summoned back by telephone from Athens or telegram to come back and see her sick mother it seemed to me from her own testimony she did not take the next plane to Panama. She waited two or three days until Miss Cortez was around.

Now, you can infer that was because she called Panama and she said, as she stated later, that her mother was not really that ill. Or you can infer she was waiting so that she can take Miss Cortez with her with false birth

certificate that Mr. Inness provided so to combine a trip to purchase cocaine with a trip to see her sick mother.

There was discussion about the safe deposit box. The only evidence with respect to this safe deposit box is what Miss McLenan testified to. And since further information with respect to it was available to either side you can't draw any inference with respect to its failure to produce and determine the credibility to give to Miss McLenan's testimony and by inferences which can be drawn from it.

There was discussion during Mr. De Petris' summation about when Mr. Welch made his last purchase, said he made his last purchase.

My notes were that he said he bought some after March and April and during the summertime. Whether he said afterwards that it was in the month of June I am not sure.

As you observed, counsel can't always be accurate in the way they described testimony and even the Court can't.

There was a lot of talk at one point

during the cross-examination of Miss Cortez about the fact that she had lived four months with Miss McLenan. When the documents came in it came out it was about from about March 19th to May 26th, which is a little over two months.

There was reference to Mr. Welch's reluctance to testify and to the presence of people in the courtroom.

I think you should bear in mind there is no testimony or evidence that there was any threats against Mr. Welch by any of the defendants.

You may consider whether there was any reluctance to testify because of the fact that he was brought in on a material witness warrant. And there is nothing else you can consider with respect to the defendants on that basis.

There is a good argument that the defendants have with respect to Miss Cortez having told the Agent at the beginning and Mr. London when he came and talked to her that

she was not bringing the cocaine in for Miss McLenan and Mr. Inness and she used the name Morales which she said at one point was a name she just made up.

Mr. DePetris addressed himself to that point and it will be up to you to determine how much weight to give to that difference between her statements when she was not under oath and her testimony as she gave it in this court.

As I have said, there is a great deal of evidence in the case. You have been listening attentively. And while you haven't been taking any notes you have had no distractions and I think you do remember it fairly well.

The fact that I may have emphasized a couple of points either in illustrating types of evidence or in commenting does not mean you shouldn't consider everything you have heard and is not to be taken as an impression of an opinion on the guilt or innocence of either of the defendants. You are the judges

of the facts. Nothing counsel said or nothing I said prevents you from making your own determination on the facts on your own recollection of the evidence and in applying those facts to the law as I have set it forth.

Now a few words about reaching a verdict.

First, of course your verdict must be unanimous on each count. That means you must all agree on each count.

It is wise to discuss the evidence fully before taking even a tentative vote, so that no one will jump to a hasty conclusion before weighing the entire case.

If you want to have some of the testimony repeated, the first two days which is mainly Miss Cortez' testimony was transcribed. The rest of it is in reporter's notes and I am not--do you know if Mr. Rubinstein is here today? I am not sure we can get the reporter up--or we can get him up and read it to you if it is necessary. It may take some time to find the reporter who took it.

If you want to look at the exhibits you may ask for it. If you want to look at the

cocaine package I will send a marshall in with it because nobody should be in possession of it even for an innocent purpose.

When you go into the jury room, Mr. Weiner, your foreman, as I have said, he will preside over your deliberations. His principal job will be to try to say that not more than one person talks at a time and to try to give everybody a chance to be heard and to help guide you in determining when you may take a ballot. But his vote counts no more than anyone else.

During your deliberations you should assume the attitude of judges of the facts rather than partisans or advocates. In that way you are making a high contribution to the administration of justice.

You must report a verdict on all three counts. Both defendants are on the first and second counts and only Miss McLenan is on the third count. And I will give you a form of verdict so that you can fill it in without any confusion or uncertainty.

You can find one or both guilty or not guilty on either of the first counts and, of course, Miss McLenan either guilty or not guilty on the third count.

If you have any questions there will be a marshall sitting outside the jury room and you can send a note to him.

When you have reached a verdict the foreman should give him a note merely saying you have reached a verdict. And when you are in court he will announce it orally.

Either party has a right to have the jury polled, and which means to ask each juror whether he or she agrees with the verdict so that we can be sure it is unanimous.

Again, in determining guilt or innocence you shouldn't give any consideration to the matter of punishment because that is my responsibility if either defendant is found guilty.

You are each entitled to your own opinions, but you should exchange your views with your fellow jurors and listen carefully to each other.

While you shouldn't hesitate to change your original opinion if you are convinced that another opinion is correct, but you don't have to give it to a majority and your decisions must be your own.

Normally it takes until about 1 o'clock to get the lunch here. And since that is our normal lunch hour I will excuse counsel at about that time and at least when your lunch comes in and if you have questions try to submit them before one or after two.

There is a procedure in the rules that after the Court has delivered its instructions counsel may take exception to the instructions or to any omissions outside the presence of the jury. So while you go back to the jury room now I may possibly call you out again and add something to the charge. But on the assumption that I may not and we conclude with this, your oaths sum up your duties, that is, without fear or favor to any person, you will well and truly try the issues between these parties according to the evidence given to you

in court and the laws of the United States.

You will now please go into the jury room and I will excuse Miss Gavney and Mr. Weber. We almost needed one of you but there is no more function for you to perform.

Now let's swear the marshalls before they go in.

(The marshalls are sworn.)

THE COURT: Do the alternates have anything in the jury room you want to get?

AN ALTERNATE JUROR: Yes.

THE COURT: Suppose you get that and the clerk will take you into the witness room and you can wait there until your lunch comes.

(The jury leaves the courtroom for the purposes of beginning their deliberations at 12:01 P.M.)

THE COURT: Are there any exceptions to the charge, Mr. DePetris?

MR. DE PETRIS: No, your Honor.

THE COURT: And Mr. Preminger?

MR. PREMINGER: No exceptions, but I have a request.

THE COURT: All right.

MR. PREMINGER: Your Honor didn't charge I don't believe the importance of a criminal record. Mr. Welch had an extensive criminal record and I think that should be mentioned and as to what effect that would have on his testimony.

MR. DE PETRIS: I believe it was mentioned.

THE COURT: I mentioned it.

MR. PREMINGER: You said it about accomplice.

THE COURT: I said in certain types of crime the Government is compelled to rely on the testimony of accomplices and persons with criminal records.

Now perhaps I could have added more to it but I did not have the specific requests for it.

MR. PREMINGER: Judge, on the criminal record it is always charged by itself and every judge I have heard charged it. And I don't think it was necessary to request about Mr. Welch's criminal record since it was an

important part of the case. I must have spent forty-five minutes on it on cross-examination.

THE COURT: All right, maybe I will add it.

MR. DE PETRIS: Your Honor did indicate that and at the end of it you indicated that their testimony should be judged with extreme caution and great scrutiny.

MR. PREMINGER: That had to do with accomplices and people who were accomplices. You never mentioned Welch has a criminal record.

THE COURT: Mr. Handman?

MR. HANDMAN: I join in Mr. Preminger's request and in view of the material that was brought out at great length by Mr. DePetris in his closing today I would request that your Honor charge with regard to the fact that aiding Miss Cortez-Cunate to cross into the United States illegally is not a crime charged in this case. And that I would also request that if the jury finds that

Miss McLenan and Mr. Inness helped Cortez-Cunate to cross the border that that alone does not prove that they are guilty of smuggling cocaine.

MR. DE PETRIS: If your Honor is going to charge that, if your Honor is going to bring them back and charge that, I would ask that the Court charge the jury that may have in fact may have been an overt act in furtherance of a conspiracy.

MR. PREMINGER: If they believe that there was knowledge that would be. And if they may not believe that, that by itself would not be.

MR. DE PETRIS: But I don't see the reason to bring them back. I think your charge was very sufficient.

MR. HANDMAN: I wrote these three requests out, your Honor, which I hand out.

THE COURT: Pretty late.

MR. PREMINGER: The third one, your Honor, it's only on the same point, your Honor, and that would be a charge if the facts as found

by the jury, are equally consistent with the defendants being guilty only of knowledge of Cortez-Cunate's illegal entry into the United States as with their being guilty of smuggling cocaine, then the Government has failed to prove the defendants guilty of this charge.

THE COURT: Well, I think what I gave them is sufficient.

MR. HANDMAN: Also on one other subject, and that is if the witnesses Cortez-Cunate and Welch gave one statement or gave the statement to the Government Agents or the prosecutor and then testified differently here in court they would be subject to the penalty of perjury.

MR. DE PETRIS: That's not necessarily true, your Honor.

MR. HANDMAN: This also is a point you raised in implying they could testify whatever way they wanted here without being subject to any force or penalty.

THE COURT: The jury heard that they

were under oath. I don't think there is a need to say that.

MR. HANDMAN: My request was that if they gave a statement implicating these defendants and changed their testimony away from that point of view they would be subject to perjury.

MR. DE PETRIS: I don't think it's an accurate statement, your Honor, because if they testified here differently and there is an acquittal on the basis of what are you going to prosecute them? The statement is not under oath.

MR. PREMINGER: Also, your Honor, your Honor said the motivation to lie by Miss Cunate is less because she was already sentenced. But I think it is a fact she came into this country illegally and she can be prosecuted for that and that hasn't been mentioned. So perhaps the Government is holding that over her head. That could be an inference, too.

I didn't know your Honor was going to

comment about the fact that her interest as an accomplice or her reliability has been increased because she has been sentenced, because there are many things the Government now could hold over her head to compel her to continue to testify in a way in favor of the Government.

THE COURT: I thought the position in the cross-examination was that she had been cleared of her illegal entry. After all, she is being deported.

MR. PREMINGER: It doesn't mean that the Government can't reverse their position. I don't know that it's final.

THE COURT: I will not accept requests like that at this time.

Ask the jury to come in.

I will charge them they can consider a criminal record as bearing on credibility and that proof of illegal entry and if the purpose was only for the purpose of aiding illegal entry it is not enough.

All right.

THE CLERK: Should I take the exhibits, Judge, or just leave them on the table?

MR. DE PETRIS: Do they want the exhibits?

THE COURT: No. But I think the exhibits should be left with the clerk and I would like an understanding they can be handed to the jury without reassembling you.

MR. DE PETRIS: Yes.

(The jury enters the courtroom at 12:11 P.M. for the purposes of receiving further instructions.)

MR. DE PETRIS: Except the cocaine, your Honor?

THE COURT: Yes.

Mr. Weiner and ladies and gentlemen, I have been asked to make two additions to my instructions.

The first is: Considering the credibility of Mr. Welch you can consider his criminal record. I thought that was implicit, but I did not express the statement.

And the second is in connection with Miss Cortez-Cunate illegal entry into the

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

HERMAN KAUFMAN, being duly sworn, deposes and says: deponent is not a party to the action, is over eighteen years of age and has his office at 120 Broadway, New York, New York. On March 31, 1976 deponent served two copies each of the within brief and appendix filed in behalf of appellant Gertrude McLenan upon:

The Honorable David G. Trager
United States Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201

Marvin Preminger, Esq.
Preminger, Meyer & Light
66 Court Street
Brooklyn, New York 11201

the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Herman Kaufman

Sworn to before me this
31st day of March, 1976

Margaret L. Eirman

MARGARET L. EIRMAN
Notary Public, State of New York
No. 24-4606127
Qualified in Kings County
Commission Expires March 30, 1977